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No.

In the Supreme Court of the United States

October Term, 1982

OFFICER SWYKA, CAPTAIN L. G. TOHEY, ROBERT MARONEY, DEPUTY SUPERINTENDENT, GEORGE PETSOCK, SUPERINTENDENT,

Petitioners

v.

CARL LEE JOHNSON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

55pp

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in holding that Pennsylvania's six-month statute of limitations for actions against public officials may not be borrowed for purposes of a federal civil rights action because the state statute of limitations is too short and, therefore, inherently conflicts with the policies underlying the civil rights statutes?

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OPINIONS BELOW

The opinion of the Third Circuit (1a-3a), the order of the district court (4a), and the report and recommendation of the magistrate, (6a-10a) are not reported.

STATEMENT OF JURISDICTION

The court of appeals filed its opinion on February 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTES INVOLVED

1. 42 U.S.C. §1988 provides, in pertinent part, as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

2. 42 Pa. Cons. Stat. §5522 (b) (1) provides, as follows:

> Commencement of action required. The following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

STATEMENT OF THE CASE

This is a civil rights action, brought under 42 U.S.C. §1983, by an inmate of a state prison. The essence of the inmate's complaint was that the procedures utilized by prison officials in finding him guilty of misconduct failed to afford him due process.

The United States District Court for the Western District of Pennsylvania, adopting the report and recommendations of the United States Magistrate (6a-10a) dismissed the complaint (4a-5a). The magistrate had concluded that Pennsylvania's six-month statute of limitations, which governs actions against public officials,[1] barred the inmate's claim, which was filed almost nine months after occurrences of which he complained (9a).

The Court of Appeals for the Third Circuit reversed, holding, in a *per curiam* opinion, that the district court had relied improperly on the six-month statute of limitations[2] (2a-3a). In so doing, the court, relied entirely, without discussion upon its recent decision in *Knoll v. Springfield Township School District,* 699 F.2d 137 (3d Cir. 1982).[3]

In *Knoll,* an employment discrimination case, the Third Circuit concluded that application of a state's six-month limitations period to a civil rights action is inher-

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[1] 42 Pa. Cons. Stat. §5522(b).

[2] The magistrate recommended that the prison officials' motion to dismiss for failure to state a cause of action not be granted (6a-10a). The court of appeals declined to reach that issue (3a).

[3] A copy of the *Knoll* opinion is included in the appendix to this petition (11a-33a).

ently inconsistent with the policies underlying the federal civil rights acts.[4] The court of appeals bottomed its conclusion on three bases.

First, the court opined that, despite the "ongoing, dynamic" expansion of civil rights remedies, "the average citizen is not sufficiently conversant" with constitutional law to file a lawsuit within six months of the offending action. Second, the court found that the six-month statute would have a tendency "to severely limit access" to the federal courts and, therefore, would conflict with the remedial spirit of the civil rights statutes. Finally, the court determined that, even if application of the six-month statute of limitations did not violate the "remedial spirit" of the civil rights acts, "it would be inconsistent with the legislative history and subsequent judicial construction of those acts." The court looked to other civil rights provisions, Sections 1981, 1982 and 1985 of Title 42, which afford relief against non-governmental defendants, and held that, because a different limitations period would apply to those private parties, the lack of uniformity violated the policies underlying Section 1983 (24a-26a; 699 F.2d, at 142-144).

The court of appeals denied an application for rehearing filed by the defendants in *Knoll*. Four judges would have granted rehearing *en banc*. Judge Adams, writing on behalf of the dissenters, noted that the court's decision conflicted with decisions of the First and Eighth Circuits.[5] He also observed that the panel, in its opinion, failed to follow

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[4] Having rejected the six-month limitation, the Third Circuit applied a six-year limitation (26a; 699 F.2d, at 145).

[5] Judge Adams made reference to *Burns v. Sullivan*, 619 F.2d 99 (1st Cir.), *cert. denied*, 499 U.S. 893 (1980) and *Warren v. Norman Realty Co.*, 513 F.2d 730 (8th Cir.), *cert. denied*, 423 U.S. 855 (1975). See pp. 8-11 *infra*.

this court's admonition in *Board of Regents of the University of the State of New York v. Tomanio,* 446 U.S. 478 (1980), "to give weight to the significant policies underlying the state statute of limitations." Judge Adams took issue with the court's failure to explain "with any precision" why the limitations period could not be squared with the policies underlying the civil rights statutes. Likewise, Judge Adams criticized the court's conclusion, made without specific reference to the facts of the case before it or any other empirical data, that six months was too short a time for the "average plaintiff" to file a complaint (32a-35a; 699 F.2d, at 146-148).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of Other Courts of Appeals as to the Suitability of Applying to Federal Civil Rights Actions Six-Month Statutes of Limitations

Section 1988 of Title 42 provides, in pertinent part, that federal courts adjudicating civil rights claims shall refer to state law "when federal law provides no rule of decision." *Board of Regents of the University of the State of New York v. Tomanio,* 446 U.S. 478, 484 (1980) (hereinafter *"Tomanio"*). Under Section 1988, state law may be disregarded only if it is "inconsistent with the Constitution and laws of the United States", or if it is "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 465 (1975). Because the civil rights statutes have no statutes of limitations, state law supplies the rule of decision. *Tomanio, supra,* 446 U.S. at 485.

Pennsylvania law prescribes a six-month statute of limitations for actions brought against government officials, such as petitioners here.[6] 42 Pa. Cons. Stat. §5522

[6] 42 Pa. Cons. Stat. §5522(b) provides as follows:

Commencement of Action Required.—The following actions and proceedings must be commenced within six-months:

(1) An action against an officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

(b). In reliance upon what it conceived to be the "remedial spirit" of the civil rights statutes, the Third Circuit concluded in *Knoll,* and applied its conclusion here, that six months simply is too short a time period in which to expect the average plaintiff to realize the import of the action taken against him and to file a lawsuit. In reaching its decision, the Third Circuit ignored decisions of the First and Eighth Circuits upholding application of six-month limitations periods to civil rights claims.

In *Burns v. Sullivan,* 619 F.2d 99 (1st Cir. 1980), the court of appeals applied Massachusetts' six-month limitation to a civil rights race discrimination claim. The First Circuit found the six-month period to be reasonable. "Although it may take more than six months to properly prepare a civil rights case, a complaint meeting the requirement of Fed. R. Civ. P. 8 (a) can surely be filed in that time. And amendments to the complaint and supplemental pleadings may be sought after suit is brought. Fed. R. Civ. P. 15." *Id.,* at 106. The court also emphasized the "important policy reasons" which support using the limitations applicable to similar actions in state court; a longer limitations period for federal actions would encourage initial resort to federal court thereby further involving the federal courts in local matters. *Ibid.* The First Circuit consistently has followed *Burns. See, e.g., Hussey v. Sullivan,* 651 F.2d 74 (1st Cir. 1981); *Holden v. Massachusetts Commission Against Discrimination,* 671 F.2d 30 (1st Cir.), *cert. denied,* 103 S.Ct. 97 (1982); *Carter v. Supermarkets General Corp.,* 684 F.2d 187 (1st Cir. 1982); *Dewey v. University of New Hampshire,* 694 F.2d 1 (1st Cir. 1982).

Pennsylvania has no statute of limitations which specifically applies to civil rights actions or claims alleging a denial of due process.

Similarly, the Eighth Circuit in *Warren v. Norman Realty Co.*, 513 F.2d 730, *cert. denied*, 423 U.S. 855 (1975) and *Green v. Ten Eyck*, 572 F.2d 1233 (1978), applied to federal civil rights claims challenging local housing practices 180-day limitations imposed by Nebraska's and Missouri's fair housing laws.[7]

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[7] At least 33 states have statutes of limitations of less than one year which, arguably, could be applied to a civil rights action. *See* ARIZ. REV. STAT. ANN. §41-1481 (six-month limitation; employment discrimination); COLO. REV. STAT. §24-34-504 (90-day limitation; housing discrimination); CONN. GEN. STAT. §46a-82 (six-month limitation; employment discrimination); DEL. CODE ANN. tit. 6 §4605 (six-month limitation; housing discrimination); FLA. STAT. ANN. §23.167 (six-month limitation; employment discrimination); GA. CODE ANN. §89-1714 (six-month limitation; employment discrimination); HAWAII REV. STAT. §378-4 (90-day limitation; discrimination action); ILL. REV. STAT. ch. 68 §7-102 and 103 (180-day limitation; civil rights violation); IND. CODE ANN. §34-4-16.5-7 (180-day limitation; political subdivision claim); IOWA CODE ANN. §601 A.15(12) (180-day limitation; employment discrimination); KAN. STAT. ANN. §44-1004 and 1005 (six-month limitation; employment discrimination); KY. REV. STAT. §344.200 (six-month limitation; employment discrimination); ME. REV. STAT. ANN. tit. 5 §4611 (six-month limitation; employment discrimination); MASS. GEN. LAWS ANN. ch. 151B §5 (six-month limitation; employment discrimination); MICH. STAT. ANN. §3.548(601) II(b) (90-day limitation; employment discrimination); MINN. STAT. ANN. §363.06 (six-month limitation; employment discrimination); MO. ANN. STAT. §213.120 (180-day limitation, housing discrimination); MONT. CODE ANN. §49-2-501 (six-month limitation; employment discrimination); NEB. REV. STAT. §20-119 (six-month limitation; housing discrimination); NEV. REV. STAT. §613.430 (six-month limitation; employment discrimination); N.H. REV. STAT. ANN. §354-A:10 (90-day limitation; discrimination action); N.J. REV. STAT. §10:5-18 (six-month limitation; discrimination); N.M. STAT. ANN. §28-1-10 (90-day limitation; discrimi-

The Third Circuit here and in *Knoll* chose not to acknowledge the decisions cited above or to canvass the important state policies reflected in Pennsylvania's statute of limitations. Instead, the court made its own judgment as to what limitations period is fair and reasonable. Because this decision conflicts with decisions of the First and Eighth Circuits, certiorari should be granted to review the judgment below.

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2. The Decision Below Involves an Important Question of Federal Law Regarding Application of State Statutes of Limitations to Federal Civil Rights Actions and Conflicts With the Decisions of This Court

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As Judge Adams observed in his dissent from the denial of rehearing in *Knoll:* "There is no indication that the opinion in the present case follows Tomanio's direction to give weight to the significant policies underlying the state statute of limitations" (34a; 699 F.2d, at 147). The Third Circuit's failure properly to apply the *Tomanio* test justifies this Court's review.

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nation action); OHIO REV. CODE ANN. §4112.05 (six-month limitation; discrimination action); OKLA. STAT. ANN. tit. 25 §1501 (six-month limitation; discrimination action); R.I. GEN. LAWS §28-6-10 (four-month limitation; employment discrimination); S.C. CODE ANN. §65-2D(1) (six-month limitation; employment discrimination); S.D. CODIFIED LAWS §20-13-31 (180-day limitation; discrimination action); TENN. CODE ANN. 4-21-117 (180-day limitation; discrimination action); UTAH CODE ANN. 34-35-7(15) (30-day limitation; discrimination action); VA. CODE §36-94 (180-day limitation; housing discrimination); W.VA. CODE §5-11-10 (90-day limitation; discrimination action); WYO. STAT. §27-9-106 (90-day limitation; employment discrimination).

The teaching of *Tomanio* is that, in civil rights actions, "state statute[s] of limitations . . . are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law." 446 U.S., at 484. Only if the policies underlying the state limitations period are inconsistent with the federal policies reflected in the civil rights statute may the state statute be ignored. 446 U.S., at 487. In this case the Third Circuit erred in failing even to consider the policies on which the state statute is based.

Statutes of limitations are inherently arbitrary in that they involve "a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975). *See also Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). The borrowing provisions of 42 U.S.C. §1988 reflect a congressional judgment to "rely on the State's wisdom in setting a limit" on the time for bringing an analogous action. 421 U.S., at 464. Generally, a state statute of limitations which does not discriminate against federal rights and which gives the party a reasonable time to sue must be applied. *Campbell v. Haverhill*, 155 U.S. 610, 615-616 (1895).

Pennsylvania's six-month limitation period for claims against public officials fosters important state policies beyond those reflected in limitations statutes generally. State and local governments are more likely to experience frequent changes in personnel than are the other entities. The almost constant flux in which government finds itself exacerbates the problems of assembling evidence to defend claims. Even a short passage of time often will result in the departure from government of persons with knowledge of

the circumstances surrounding the claim. Frequently, upon leaving government, former officials are less than cooperative in assisting the defense. Moreover, the large volume of business and transactions handled by the government often creates serious problems in keeping track of and assembling documents necessary to defend in litigation. These considerations provide additional justification in the context of this case for respecting the state's choice.[8]

When balanced against federal policies which underlie the civil rights statutes, it is clear that the state policies in no way conflict with the federal aims. The "principal policies embodied in §1983 [are] deterrence and compensation." *Tomanio,* 446 U.S., at 488. It is difficult to see how these policies are significantly affected by Pennsylvania's statute. Claims can be readily enforced, compensation may be received, and deterrence fostered if an action is filed within six months.

The court of appeals' conclusion (21a; 699 F.2d, at 142) that six months simply is too short a time in which to file a claim is unsupported by any evidence in the case at hand or empirical data derived from other cases. Certainly Congress did not believe that 180 days inherently is too short a time in which to require that action be taken to commence civil rights proceedings. See 42 U.S.C. §2000e-5 (e) (employment discrimination); 42 U.S.C. §3610 (b) (housing discrimination). As to cases such as this one involving claims by prisoners, it hardly can be argued persuasively

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[8] In light of the strong policies which support the state's choice of a six-month limitation, it is particularly ironic that the court of appeals held that a six-year limitation period applies to civil rights actions (26a; 699 F.2d, at 145). That holding clearly flies in the face of the presumption, created by Section 1988, that the states may be relied upon to make these policy choices.

that prisoner plaintiffs generally are unaware of their rights and, therefore, need substantial time beyond six months to appreciate that their rights have been violated before they may be required to commence an action. The extent to which the federal courts are now inundated with prisoner litigation belies the Third Circuit's conclusion that the "average plaintiff" needs more time to file a claim.

The court of appeals also relied upon what it found as a federal policy, implicit in §1983, to favor vindication of individual rights (23a; 699 F.2d, at 143). Once again, the statute at issue here has no direct impact on that policy. If the Third Circuit is concerned that some rights will not be vindicated because the statute will bar the claim, it is sufficient to note that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson v. Wegmann,* 436 U.S. 584, 593 (1978).

The court of appeals also relied upon what it considered to be a congressional policy of uniformity (23a-26a; 699 F.2d, at 143-144). The court found this policy to be undetermined by the possibility that one limitations period would apply to public officials under 42 U.S.C. §§1983 and 1985, while a different limitations period applied to private defendants sued under 42 U.S.C. §§1981, 1982 and 1985. Once again, the court ignored this Court's teachings.

As the Court observed in *Tomanio,* the claim that federal policy requires uniformity in application of limitations statutes to civil rights claims consistently has been rejected. "The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions." 446 U.S., at 489. Congressional reliance on state law obviously presupposes the lack of nationwide unifor-

mity. *Robertson v. Wegmann, supra,* 436 U.S., at 594, n. 11. The same rationale applies here. If Congress had no difficulty with the application of varying limitations for the very same cause of action brought in different states, it is unreasonable to suggest that federal policy is substantially affected by the application of different limitations to different causes of action brought in the same forum.

In the final analysis, there is no substantial basis in this case to reject out of hand the state's considered judgment that claims against public officials must be commenced promptly. The federal policies of compensation for civil rights violations and deterrence of future misconduct are not undermined in the slightest by application of Pennsylvania's six-month statute of limitations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Third Circuit.

Respectfully submitted,

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Date: May 17, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5594

CARL LEE JOHNSON,
Appellant

v.

OFFICER SWYKA, CAPT. L. G. TOHEY, ROBERT MARONEY, DEPUTY SUPT., GEORGE PETSOCK, SUPERINTENDENT

Appeal From the United States District Court For the Western District of Pennsylvania—Pittsburgh
(D.C. Civil No. 82-881)

District Judge: Honorable Gerald J. Weber

Submitted Under Third Circuit Rule 12 (6)
February 10, 1983

Before: Aldisert, Hunter and Sloviter, *Circuit Judges.*
(Filed February 18, 1983)

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OPINION OF THE COURT

PER CURIAM.

In our recent decision in *Knoll v. Springfield Township School District,* F.2d , No. 82-1241 (3d Cir. Jan. 27, 1983), we held that, in a claim against state officers for employment discrimination brought under 42 U.S.C. §1983, it was improper to utilize the Pennsylvania six-month limitation period provided by 42 Pa. Cons. Stat. Ann. §5522(b)(1). Here, the district court accepted the recommendation of a magistrate who determined that plaintiff's §1983 action alleging that state prison officials had denied him due process was barred by §5522(b)(1). We are vacating the judgment of the district court and remanding for reconsideration in light of *Knoll.*

In his complaint, Carl Lee Johnson, a prisoner at the State Correctional Institution at Pittsburgh, alleged that he was taken to the institution's Restricted Housing Unit following a sit-down demonstration. The next day he received a misconduct report which he contends was false and did not provide him with adequate notice of the charges. He was afforded a disciplinary hearing on August 31, 1981,

before the institution's Hearing Committee and found guilty. After an unsuccessful appeal to the institution's Program Review Committee, he brought this civil rights action in the district court on May 13, 1982. The magistrate to whom the action was referred concluded that it was time-barred by §5522 (b) (1). Her report was adopted by the district court in an order entered on October 25, 1982.

Because the district court proceeding turned upon a statute of limitations held inapplicable in *Knoll,* we must remand this case for reconsideration. We also note that appellant alleges that he was convicted without any evidence and assessment of facts, contrary to the requirements of *Helms v. Hewitt,* 655 F.2d 487 (3d Cir. 1981), *cert. granted,* 50 U.S.L.W. 3715 (U.S. Mar. 9, 1982) (No. 81-638), which held that a prisoner was denied due process when he was convicted of a misconduct charge where the only evidence offered against him was the charging officer's hearsay recital of an unidentified informant's uncorroborated report. Inasmuch as we are remanding for reconsideration in light of *Knoll,* it may be well for the district court to hold the matter in abeyance until the Supreme Court decides the *Helms* case.

The judgment of the district court will be vacated and the cause remanded for proceedings in accordance with the foregoing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-881

CARL LEE JOHNSON,

Plaintiff

vs.

CAPT. L. G. TOHEY, ROBERT MARONEY, DEPUTY SUPT., GEORGE PETSOCK, SUPERINTENDENT, OFFICER SWYKA,

Defendants

MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on May 13, 1982, and was referred to United States Magistrate Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. Section 636 (b) (1), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate's report and recommendation, filed on August 18, 1982, recommended that defendants' motion to dismiss be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff on August 19, 1982, by delivery to the State Correctional Institution at Pittsburgh, where he is

incarcerated and on defendants on August 19, 1982. Objections were filed by plaintiff on August 26, 1982. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 13th day of September, 1982;

IT IS HEREBY ORDERED that defendants' motion to dismiss is granted.

The report and recommendation of Magistrate Sensenich, dated August 18, 1982, is adopted as the opinion of the court.

(s) Gerald J. Weber
Gerald J. Weber, *Chief Judge*
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-881

CARL LEE JOHNSON,

Plaintiff

vs.

CAPT. L. G. TOHEY, ROBERT MARONEY, DEPUTY SUPT., GEORGE PETSOCK, SUPERINTENDENT, OFFICER SWYKA,

Defendants

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that defendants' motion to dismiss be granted.

II. REPORT

Plaintiff is a prisoner at the State Correctional Institution at Pittsburgh, Pennsylvania, and he brings this action under the Civil Rigths Act of 1871, 42 U.S.C. Section 1983, over which this court has jurisdiction under 28 U.S.C. Section 1343 (3), seeking compensatory and puni-

tive damages in addition to injunctive relief from the defendants, prison officials, for punishing him for his participation in a sit-down demonstration without adequate due process disciplinary proceedings. Defendants' motion to dismiss was filed on June 9, 1982.

Plaintiff's complaint alleges that he was taken to the Restricted Housing Unit at the State Correctional Institution at Pittsburgh on August 25, 1981, after a sit-down demonstration had taken place in the auditorium area. The following day he received a misconduct which he claims was false and which he claims did not provide him with adequate notice of the charges. He had a disciplinary hearing on August 31, 1981, before Captain L. G. Tohey, the Chairman, and the other members of the committee. They found him guilty without any evidence and made no assessment of the facts relied upon for their decision. Captain Tohey said he had an incident report written by Lieutenant Yurich. Plaintiff asked to see the report but his request was denied. Plaintiff alleges that on October 2, 1981, Mr. Tohey gave him a new incident report with a second rationale, claiming that the original incident reports had been lost. However, he did not receive a new due process hearing. He appealed the decision of the Hearing Committee to the Program Review Committee, Mr. Maroney and others, which sustained the action of the Hearing Committee. George Petsock, the superintendent, also agreed with the Hearing Committee.

Defendants seek dismissal for failure to state a claim, asserting that prison officials are to be accorded discretion in the conduct of prison disciplinary proceedings, and that the federal courts are not to retry prison disciplinary proceedings. However, *Wolff v. McDonnell,* 418 U.S. 539

(1974) specifically held that "There must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action," 418 U.S. 564. Plaintiff alleges that he was convicted and found guilty without any evidence and any assessment of facts. This would clearly be contrary to the requirements of *Helms v. Hewitt,* 655 F.2d 487 (3d Cir. 1981), which held that a prisoner was denied due process when he was convicted of a misconduct charge where the only evidence offered against him was a hearsay recital, by the charging officer, of an uncorroborated report of an unidentified informant. The court found that the written statement by the factfinder, referred to in *Wolff* must disclose some basis for the action taken, 655 F.2d 502. Submitted with plaintiff's "Comprehensive Response", which should be treated as an amendment to the complaint, *U.S. ex rel. Walker v. Fayette County,* 599 F.2d 573 (3d Cir. 1979), is a copy of a summary which fails to reveal any of the evidence presented. It is noted that *Helms, supra* was decided subsequent to the magistrate's report and recommendation in *Feigley v. Howard,* No. 80-1739 (W.D. Pa. 1981), referred to in defendants' brief. In alleging that he was found guilty of a misconduct and sentenced to the restricted housing unit without presentation of any evidence linking him to the offense, plaintiff alleges a deprivation of due process in violation of the Fourteenth Amendment to the United States Constitution.

Defendants further seek dismissal based upon the applicable Pennsylvania statute of limitations. Since there is no federal statute of limitations for civil rights actions under Section 1983, the state statute of limitations for analogous actions applies. *Bd. of Regents of the Univ. of*

N.Y. v. Tomanio, 446 U.S. 478 (1980). In 1978 the Commonwealth of Pennsylvania enacted a six month statute of limitations which appears to be applicable to this action. 42 Pa. C.S.A. Section 5522 (b) which provides as follows:

> (b) *Commencement of Action Required.*—The following actions and proceedings must be commenced within six months:
>
> (1) An action against an officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

There appears to be no other Pennsylvania statute of limitations applicable to an action alleging failure to accord an inmate due process at prison disciplinary hearings. Since plaintiff alleges that the deprivations occurred on August 25, 1981, when he was given his first misconduct and on August 31, 1981, when he had his hearing, and since his complaint was not received by the Clerk of Court until May 13, 1982, over nine months later, plaintiff's action is barred by the statute of limitations. Therefore it is recommended that defendants' motion to dismiss be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b) (1) (B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendations.

(s) Ila Jeanne Sensenich
ILA JEANNE SENSENICH
United States Magistrate

Dated: August 18, 1982

cc: The Honorable Gerald J. Weber, Chief Judge
United States District Court

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Certified Mail, Return Receipt Requested

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1241

KNOLL, MADELIN H.,

Appellant

v.

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania; ROMAN, LOUIS A., Superintendent, Springfield Township School District; LAWN, JOHN J., HANSHAW, MARIE M., COMMINS, JAMES A., GOREN, SARA LEE, HOCH JR., WILLIAM C., HOGUE JR., E. BURKE, KALISH, SALLY, LIEBERMAN, MAX L. and TOBIN, HARPUR M., individually and as members of the Board of School Directors, Springfield Township School District

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Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 81-1626)

Submitted Under Third Circuit Rule 12 (6)
January 6, 1983

Before: Aldisert, Gibbons, and Higginbotham,
Circuit Judges

(Filed January 27, 1983)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Until recently, Pennsylvania's omnibus six-year statute of limitations, set forth in the Act of March 27, 1713,[1] properly governed employment discrimination suits brought in Pennsylvania under the federal civil Rights Acts. By 1978, however, Pennsylvania had repealed the Act of 1713 and completely revised its statutes of limitations.[2] The major question before us is whether a new six-month statute of limitations governing suits against government officials applies to employment discrimination claims

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[1] Pa. Stat. Ann. tit. 12, §31 (Purdon 1953 & Supp. 1982) (repealed 1978).

[2] *See* Act of July 9, 1976, 42 Pa. Cons. Stat. Ann. §§5521-5536 (Purdon 1981).

brought under 42 U.S.C. §1983.[3] We hold that because application of the six-month limitations period would be inconsistent with the policies and legislative history underlying §1983, and because none of Pennsylvania's more specific limitations provisions would apply, that the six-year residuary provision of the limitations schema should govern this dispute. We, therefore, reverse that part of the district court's judgment which determined that appellant's §1983 claim was time-barred after six months. This appeal also asks us to review the district court's rejection of appellant's claim of employment discrimination brought under Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §2000e-e-17, as time-barred. We reverse that part of the judgment as well.

I.

For the purposes of our decision, we take as true the material facts alleged in the complaint. They are not complicated. On December 12, 1980, appellant Madelin H. Knoll, a teacher employed by the Springfield Township School District, filed a charge with the United States Equal Employment Opportunity Commission (EEOC), alleging that her employer had discriminated against her on the basis of sex in failing to promote her to several administrative positions. On January 28, 1981, the EEOC issued her

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[3] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

a right to sue letter and dismissed the charge as untimely filed. On April 21, 1981, she filed a civil action in the district court against the school district and the individual members of the school board contending that the school district's failure to promote her to the position of Administrative Assistant to the Superintendent in July 1979, and later to Assistant Superintendent in September 1980, violated §703 of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §2000e-2. The complaint further alleged that the individual school directors had acted under color of state law to deny appellant the equal protection of the laws under the fourteenth amendment, in violation of §1983.[4]

The school district and the individual members of the school board moved for summary judgment, arguing, *inter alia,* that both claims were barred by statutes of limitations.

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[4] She averred in her complaint, *inter alia,* that:

1) she was fully qualified and certified for the position of Administrative Assistant to the Superintendent of the School District for which she applied in July 1979;

2) she was notified by Superintendent Louis A. Roman on August 2, 1979 that he had chosen Frank Romano, a male applicant with fewer qualifications and no Pennsylvania Department of Education certification, to be his Administrative Assistant;

3) shortly thereafter, Superintendent Roman promised he would create an administrative position for her during the 1979-80 school year as compensation for not having chosen her for the position of Administrative Assistant, that no such position was created, and that on May 28, 1980, Roman wrote her that he would not, in fact, create such a position for her during the next school year;

4) in September 1980, Administrative Assistant Frank Romano was promoted to Assistant Superintendent, a position which had existed in the past but was recreated specifically for him;

After oral and written argument, the district court agreed. It ruled that the §1983 action was time-barred by the new Pennsylvania statute which limits actions against government officials to six months, and that the Title VII claim was time-barred because it was filed more than 180 days from the last discriminatory act which the court determined occurred in July 1979. The district court thus granted the summary judgment motion and dismissed the complaint. From this decision and order, Ms. Knoll appeals.

II.

Appellant's primary contention is that the district court erred in applying Pennsylvania's six-month statute of limitations to her claim of employment discrimination under §1983. That limitations provision, enacted as part of the new Pennsylvania Judicial Code, provides:

> (b) Commencement of action required—The following actions and proceedings must be commenced within six months:
>
> (1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

42 Pa. Cons. Stat. Ann. §5522 (b) (1) (Purdon 1981).

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5) although the school district, its officers, agents, and representatives, knew that she was willing and qualified to assume the position of Assistant Superintendent in September 1980, she was not offered an opportunity to compete for the vacancy and was not considered for same because of her sex;

6) the decisions not to promote her to administrative positions in July 1979, May 1980, and September 1980 were the result of a continuing policy of sex discrimination by the school district and its officers, agents, and representatives.

She argues that instead the residuary provision of Pennsylvania's limitations schema should govern her cause of action. That Code provision establishes a six-year limitations period for:

> Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application by a period of limitation by section 5531 (relating to no limitation).

42 Pa. Cons. Stat. Ann. §5527(6) (Purdon 1981). To support her argument, appellant maintains that the six-month limitations provision is not the most analogous state statute to apply to a §1983 action, that its application is inconsistent with federal policy, and that the application of different statutes of limitations to government and nongovernment defendants violates her right to equal protection under the law.

Appellant's next contention is that the district court erred in determining that her Title VII claim was time-barred. She argues that because appellees engaged in a continuing policy of discrimination, her charge was filed within 180 days of the last discriminatory act, as required by statute.

In reviewing the district court's summary judgment order, we are guided, as was the trial court, by the standard set forth in Rule 56(c), F. R. Civ. P.: summary judgment is proper when it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Goodman v. Meade Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). With this standard in mind, we will address first the question of the statute of limitations applicable to a §1983 action. In

so doing, we note that because the parties do not contest any material fact applicable to that action, we can only uphold the summary judgment ruling as to appellant's §1983 claim if we find that the six-month statute of limitations applies, as appellees contend, as a matter of law.

III.

Because Congress has not prescribed a specific statute of limitations for actions brought under §1983, it is necessary to borrow "the state law of limitations governing an analogous cause of action." *Board of Regents v. Tomanio,* 446 U.S. 478, 483-84 (1980). Selection of the appropriate state limitations provision "requires characterization of the essential nature of the federal claim within the scheme created by the various state statutes of limitation." *Davis v. United States Steel Supply,* 581 F.2d 335, 337 (3d Cir. 1978). *See also Skehan v. Board of Trustees,* 590 F.2d 470, 476 (3d Cir. 1978), *cert. denied,* 444 U.S. 832 (1979); *Myers v. Pennypack Woods Home Ownership Ass'n,* 559 F.2d 894, 900 (3d Cir. 1977); *Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (in banc).

We have analogized a claim of employment discrimination brought under the federal Civil Rights Acts, to "those torts which involve the wrongful interference with another's economic rights or interests." *Skehan,* 590 F.2d at 477 (quoting *Davis,* 581 F.2d at 339). Although these federal Civil Rights Acts do not create federal tort law, they do create, *inter alia,* a right to be accorded equal status, free of gender-based discrimination in the pursuit of personal economic interests.

Review of the new Pennsylvania limitations schema, however, fails to reveal any provision expressly applicable to claims for the torts of wrongful discharge or interference

with contractual or economic rights. *See* 42 Pa. Cons. Stat. Ann. §§5521-5536 (Purdon 1981); *Riccobono v. Whitpain Township,* 497 F. Supp. 1364, 1375 (E.D. Pa. 1980). Further, courts considering these torts have ascertained the applicable limitations period by reference to the two residuary provisions of the limitations scheme—the six-month and the six-year statutes of limitations—which control only when the nature of the dispute falls outside one of the more specific limitations provisions. *Compare Clyde v. Thornburgh,* 533 F. Supp. 279 (E.D. Pa. 1982) (six-month limitations period applicable to §1983 action) *with Riddick v. Cuyler,* No. 81-0246 (E.D. Pa. July 16, 1981) (six-year limitations period applicable to §1983 action). Because appellant's claim does not fit under one of the specific provisions, we must determine which of the two residuary provisions governs her §1983 action.

Our focus in this inquiry must shift from probing the nature of the cause of action—which is irrelevant once the more specific, non-residuary provisions have been discounted as inapplicable—to determining which statute of limitations the Pennsylvania courts would have applied had this action been brought under state law. Because the six-year limitation only applies if the six-month limitation does not, we must first determine whether the courts would have applied the shorter limitation period to an employment discrimination suit brought against public officials under state law. Because appellant seeks relief from the school district and related officials for their unconstitutional actions in discriminating against her in her employment, she clearly brings "an action against any officer of any governmental unit for anything done in the execution of his office." 42 Pa. Cons. Stat. Ann. §5522(b)(1) (Purdon 1981). We conclude, therefore, that if she had brought her action in

state court under state law, it would have been subject to the six-month limitations period. *See Clyde,* 533 F. Supp. at 286; *Eshmont v. Commonwealth,* No. 1390 (Pa. Commw. Ct. Nov. 24, 1981).

IV.

The court's authority to borrow a state statute of limitations to fill a void in federal law is not, however, unbounded. In 42 U.S.C. §1988, from which this borrowing authority is derived, Congress instructs the courts to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," so long as it is "not inconsistent with the Constitution and laws of the United States." *See Robertson v. Wegmann,* 436 U.S. 584, 588 (1978); *Moor v. County of Alameda,* 411 U.S. 693, 702-03 (1973). This instruction reflects Congress' view that a borrowed state statute serves only as the source of the federal law which appropriately governs federal civil rights actions. When poured into the federal vessel, the state statute becomes a federal legal precept, and all aspects of the proceeding must be measured by the federal interest implicated in the case. This limitation on the absorption of state law is necessary because "[s]tate legislatures do not devise their [statutes of limitations] with national interests in mind[. I]t is the duty of the federal courts[, therefore,] to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 367 (1977). Thus, in considering the potential applicability of Pennsylvania's six-month statute of limitations, we must keep as our polestar the precept that the analogous state law should not be borrowed if it is "inconsistent with the federal policy underlying [§1983]." *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 465 (1975).

After carefully considering §1983's legislative history, the Supreme Court articulated four major policies underlying the statute. First, it can "override certain kinds of state laws," to-wit, "any invidious legislation by states against the rights or privileges of citizens of the United States." *Monroe v. Pape,* 365 U.S. 167, 173 (1961). Second, "it provide[s] a remedy where state law [is] inadequate." *Id.* Third, it provides "a federal remedy where the state remedy, though adequate in theory, [is] not available in practice." *Id.* at 174. Finally, it provides "a remedy in the federal courts supplementary to any remedy any State might have." *McNeese v. Board of Educ.,* 373 U.S. 668, 672 (1963). In sum, §1983 offers "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster,* 407 U.S. 225, 239 (1972). It should thus be accorded "a sweep as broad as its language." *Griffin v. Breckenridge,* 403 U.S. 88, 97 (1971) (quoting *United States v. Price,* 383 U.S. 787, 801 (1966)).

We conclude that if we were to apply Pennsylvania's six-month statute of limitations, we would contravene the remedial purpose of federal civil rights actions and deny appellant the breadth of §1983's sweep. We would be forced to ignore Justice Harlan's insightful observation that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe,* 365 U.S. at 196 (Harlan, J., concurring). And we would ultimately defy congressional intent. In so concluding, we are influenced by pragmatic considerations as well as the legislative his-

tory and conceptual underpinning of the federal rights herein sought to be vindicated.

A.

Although actions under §1983 have been permitted since 1871, the use of this remedial vehicle in the modern era dates back only to 1961 and the landmark case of *Monroe v. Pape,* in which the Court courageously blazed a new and wide trail in constitutional law for the dual purposes of compensating persons injured by deprivation of federal rights and preventing abuses of power by those acting under color of state law. Since that decision, the definition of rights and remedies under the Civil Rights Acts has been an ongoing, dynamic process. Although experienced federal and state judges, members of the professoriat, and many, but not all, lawyers may be acutely aware of this definitional process, this professional familiarity is not widespread among members of the public. We are persuaded, therefore, that the average plaintiff who has been injured by state action is not sufficiently conversant with the intricacies and subtleties of constitutional law to recognize the constitutional deprivation, consult a lawyer, and prepare a case for filing in court within six months. Such a short statute of limitations is not "sufficently generous in [its] time period[] to preserve the remedial spirit of federal civil rights actions." *Childers v. Independent School Dist.,* 676 F.2d 1338, 1343 (10th Cir. 1982) (quoting *Shouse v. Pierce County,* 559 F.2d 1142, 1146 (9th Cir. 1977)).

B.

In addition, while the equal protection clause is not designed to create uniformity out of political, economic, and cultural diversity, it does command that the state treat

every person with equal care and respect. When there is evidence that the state failed to accord such treatment, there is evidence that individuals' constitutional rights may have been violated. The decisions of courts seeking to vindicate these rights, as here, indicates that we are close to fulfilling Karl Llewellyn's prophecy of a half century ago:

> [T]he focus of study, the point of reference for all things legal has been shifting, and should now be consciously shifted to the area of contact, of interaction, between official regulatory behavior and the behavior of those affecting or affected by official regulatory behavior. . . .[5]

If, with Dean Eugene V. Rostow, we agree that the purpose of the Constitution is to assure the people a free and democratic society and that the final aim of that society is to provide as much freedom and equality as possible for individuals, we can also agree that there has been no procedural device in the modern era that has guaranteed those assurances more than the remedies available through §1983. This statute furnishes bone and sinew to what Dean Rostow described as the root idea of the Constitution: "man can be free because the state is not."[6] Desirable public policy, as evidenced by volumes of reported cases at all levels of the judiciary, is that the courthouse doors be open for, rather than closed to, the vindication of these individual rights alleged to have been threatened by official regulatory behavior.

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[5] *Llewellyn, A Realistic Jurisprudence—The Next Step,* 30 Colum. L. Rev. 431, 464 (1930).

[6] *Rostow, The Democratic Character of Judicial Review,* 66 Harv. L. Rev. 193, 195 (1952).

Applying a six-month statute of limitations would have a decided tendency to severely limit access to the courts for the purpose of vindicating these individual rights. It would be counterproductive to the popular recourse to the Civil Rights Acts. And it also would fly in the face of Cardozo's admonition that "the final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[7]

C.

Even if application of the six-month limitations provision would not contravene the remedial spirit of the federal Civil Rights Acts, it would be inconsistent with the legislative history and subsequent judicial construction of those Acts. Section 1983 derives from §1 of the Civil Rights Act of 1871. Act of April 20, 1871, ch. 22, §1, 17 Stat. 13. State action is required for it to become operative. Because §1983 represents only one section of the 1871 Act, however, it should not be considered *in vacuo,* and interpretive reference should be made to other relevant provisions, such as §2 of the Act, now codified as §1985(2),[8] which reaches private action. *See Griffith,* 403 U.S. at 96-101.

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[7] B. Cardozo, The Nature of the Judicial Process 66 (1921).

[8] 42 U.S.C. §1985(2) punishes persons who, *inter alia:*

> conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

For the original draft of §2 of the Act of 1871 and a history of its subsequent codification by Secretary of State Hamilton Fish in 1874, *see Brawer v. Horowitz,* 535 F.2d 830, 837-41 (3d Cir. 1976).

In considering the legislative history surrounding these two provisions of the 1871 Act,[9] we have unearthed no evidence that Congress intended one limitations period to apply to suits brought under §1, where state action is required, and another period to apply to §2 suits implicating private action. But if we apply the literal language of the new Pennsylvania statutes of limitations, that is exactly what results. Because government officials are uniformly defendants in §1983 suits, the six-month limitations provision of §5522(b)(1) would govern their causes of action; whereas a §1985(2) suit against a non-government defendant would always be subject to one of the other limitations provisions.

In addition to §§1983 and 1985, several other statutes comprise the remainder of the federal Civil Rights Acts. An examination of two of these statutes, 42 U.S.C. §§1981[10] and 1982,[11] which, like §1985, reach private ac-

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[9] *See e.g.*, The Reconstruction Amendments' Debates 484-570 (Va. Comm'n. on Const. Gov't 1967) (setting forth excerpts of the debates reprinted in the Congressional Globe, 42d Cong., 1st Sess. (1871)).

[10] 42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalites, taxes, licenses, and exactions of every kind, and to no other.

[11] 42 U.S.C. §1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

tion, highlights the anomalous result that can stem from applying different statutes of limitations to suits involving private and public defendants.

Suits brought under §§1981 and 1982 against private defendants, like those brought under §1985, would never be subject to Pennsylvania's six-month statute of limitations. In fact, we have recently held that a claim based on §1981, charging a private employer with failure to protect an employee from harassment because of race, would be subject to a six-year statute of limitations. *Davis,* 581 F.2d at 341. We also have held that a claim based on §§1981 and 1982, alleging a wrongful refusal to sell or rent housing, would be subject to a six-year limitations period. *Meyers,* 559 F.2d at 903. Even though these decisions predate the recodification of Pennsylvania's statutes of limitations, because they involve private defendants in discrimination actions that would not be covered by the more specific provisions of the new Code, the residuary six-year period of limitations would still apply were these suits instituted today under the new limitations schema.

We refuse to believe, however, that Congress intended to sanction the application of a six-year limitations period to federal civil rights actions involving housing or race discrimination where the parties were private citizens, but only a six-month statute of limitations to otherwise identical actions involving public officials. Such a result would be contrary to the statutory schema adopted in 1871 in which Congress addressed in one comprehensive statute both public and private discrimination. "It is abundantly clear that one reason [§1983] was passed was to afford a federal right in federal courts because . . . the claims of citizens to the enjoyment of the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might

be denied by state agencies." *Monroe,* 365 U.S. at 180. To constrict this right by imposing a six-month limitations statute where there are public defendants would, in our view, run completely counter to the intent of the 1871 Congress. Because we reject the application of the shorter limitations provision as violative of the policy and legislative history underlying §1983, we need not go on to address appellant's constitutional argument that applying different limitations provisions to government and nongovernment defendants violates her rights to equal protection. *See Ashwander v. TVA,* 297 U.S. 288, 341 (Brandeis, J., concurring).

D.

"We are not at liberty to seek ingenious analytical instruments" that would dilute the power of §1983 or the majesty of its objectives. *See Price,* 383 U.S. at 801. Accordingly, we hold that the district court erred in applying Pennsylvania's six-month statute of limitations to this §1983 action as a basis for granting appellee's summary judgment motion. The void created by Congress' failure to establish a statute of limitations for §1983 actions cannot be filled with a state limitations provision which is inconsistent with the federal interest sought to be vindicated. In addition, we conclude that Pennsylvania's residuary six-year statute of limitations, which applies in the absence of another applicable limitations provision, should govern this §1983 action because it "better serves the policies expressed in the federal statute[]." *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 240 (1969).

V.

We now turn to appellant's claim of employment discrimination based on a violation of Title VII. We first note that because a cause of action under §1983 is distinct and

independent, and has different procedural, jurisdictional, and remedial characteristics from a Title VII action, that appellant has the right to proceed under both statutes. *Scott v. University of Del.*, 601 F.2d 76, 79 n. 2 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Moreover, the legislative history of Title VII supports "the clear inference . . . that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-9 (1974).

To affirm the district court's summary judgment order, we must determine that there existed no dispute as to any material fact and that defendants were entitled to judgment as a matter of law. *Goodman*, 534 F.2d at 573. Neither this court on appeal nor the district court at trial is authorized, in approving a summary judgment order, to decide disputed issues of fact; our sole task is to determine whether an unresolved issue of material fact existed at the time the ruling was made. *Id.* Accordingly, we must view inferences from facts contained in the evidentiary materials submitted to the district court in the light most favorable to the party opposing the summary judgment motion. *Id.* That party's allegations must be taken as true and, when those assertions conflict with those of the movant, the former must receive the benefit of the doubt. *Id.; see, e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972).

By its terms, Title VII requires that a charge be filed with the EEOC within 180 days of the alleged discriminatory act. This requirement operates as a statute of limitations, such that a complainant's failure to file within this period operates to bar relief in federal court on the merits.

Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238, 4240-41 (U.S. Feb. 24, 1982). The district court found that the last act of discrimination took place in July, 1979 when appellant's application for the post of Administrative Assistant was denied. We must decide, therefore, not whether this district court determination was correct, but whether in making it, the district court impermissibly resolved a disputed issue of material fact.

Before us, appellant urges, as she did before the district court, that the appellees engaged in a continuing policy of discrimination. She contends that the school district committed three distinct acts of discrimination, to-wit, on August 2, 1979 when the male applicant Romano was hired as Administrative Assistant; on or about May 28, 1980 when the Superintendent notified her that he would not, as promised, create an administrative position for her during the next school year; and in September 1980 when Romano was promoted to Assistant Superintendent. She maintains that appellees' policy of discrimination existed in 1979 and lasted through September, 1980.

In determining the motion for summary judgment, the district court had before it only plaintiff's complaint, her exhibits, the answer, the briefs, and its recollection of oral argument. The parties did not supply the court, and the materials furnished us do not disclose, any depositions, answers to interrogatories, and admissions on file, together with supporting affidavits, which are permitted in summary judgment procedures under Rule 56 (e), F. R. Civ. P.

In her complaint plaintiff averred:

> 22. The decisions not to promote Plaintiff Knoll into an administrative position in July 1979, May 1980 and September 1980, were the result of a

> *continuing policy of discrimination* against Plaintiff on the basis of sex by the School District and its officers, agents and representatives acting within the scope of their authority and on behalf of the School District.

(Emphasis added.) The defendants presented a general denial, but no countervailing facts to dilute her averment of a continuing policy of discrimination.

In the context of a summary judgment proceeding, we must accept as true plaintiff's averment that defendants maintained a continuous policy of discrimination that lasted into September, 1980. However, we do not hold that plaintiff proved her contention as to when the last discriminatory act occurred, only that whether that last act occurred in September 1980 is a material fact that was still in dispute at the time the district court granted the summary judgment motion. Thus, the district court erred when it determined that, as a matter of law, appellant's Title VII claim was time-barred. *See Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980).

VI.

Accordingly, we will reverse the summary judgment order of the district court and remand the cause for further proceedings.

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1241

KNOLL, MADELIN H.,

Appellant

v.

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, a political subdivision of the Commonwealth of Pennsylvania; ROMAN, LOUIS A., Superintendent, Springfield Township School District; LAWN, JOHN J., HANSHAW, MARIE M., COMMINS, JAMES A., GOREN, SARA LEE, HOCH JR., WILLIAM C., HOGUE JR., E. BURKE, KALISH, SALLY, LIEBERMAN, MAX L. and TOBIN, HARPUR M., individually and as members of the Board of School Directors, Springfield Township School District
(D.C. Docket No. 81-1626)

Sur Petition for Rehearing

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, *Circuit Judges*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Weis, Garth and Hunter would grant rehearing in banc.

BY THE COURT,
John J. Gibbons
Circuit Judge

Dated: February 23, 1983

STATEMENT OF JUDGE ADAMS SUR DENIAL OF PETITION FOR REHEARING

The panel decides that the six-month limitations period of 42 Pa. Cons. Stat. Ann. §5522(b)(1) (Purdon 1981) is inapplicable to actions brought under 42 U.S.C. §1983, because six months is so brief as to be inconsistent with the policies of section 1983. This position is taken despite the panel's recognition that in section 1983 actions the federal courts must normally borrow the state limitations period governing analogous causes of action, and that, had the present action been brought "in state court under state law, it would have been subject to the six-month limitations period." Slip op. at 8.

In holding that the six-month period is too constricting, the panel breaks with the two other circuits that have decided this issue. In *Burns v. Sullivan,* 619 F.2d 99, 106-107 (1st Cir. 1980), the court held that a six-month limitation is reasonable in section 1983 cases, and *Warren v. Norman Realty Co.,* 513 F.2d 730, 733-35 (8th Cir. 1975), applied a 180 day limit of a Nebraska statute of limitations to a federal action under 42 U.S.C. §1982.[1]

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[1] In *Major v. Arizona State Prison,* 642 F.2d 311 (9th Cir. 1981) the Ninth Circuit determined that a one year statute was not inconsistent with section 1983. *But cf. Childers v. Independent School District No. 1 of Bryan County, State of Oklahoma,* 676 F.2d 1334 (10th Cir. 1982), which held a 120 day limitations period for nonjudicial proceedings to be inconsistent with section 1983. In *Johnson v. Davis,* 582 F.2d 1316, 1319 (4th Cir. 1978), the court disregarded a special one year state statute of limitations for section 1983 actions in favor of the two year period of the general state statute, because of the absence of a "fair grouping and valuation of §1983 actions within the Virginia scheme of

As the panel notes, this Court is not authorized to cure lacunae in federal law by borrowing state statutes of limitations that frustrate national policies. *See Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977). But in its most recent declaration on the subject, the Supreme Court warned that state statutes of limitations are normally binding in section 1983 cases:

> In §1983 actions . . . a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases they are binding rules of law. In 42 U.S.C. §1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' when federal law provides no rule of decision for actions brought under §1983. Robertson v. Wegmann, 436 U.S. 584 (1978). See also Carlson v. Green, [446 U.S. 14, 22 n. 10 (1980)]. As we held in Robertson, by its terms, §1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States.'

Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478, 484-85 (1980) (footnote omitted).

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limitation periods [and because of the absence of] some other reasonable basis for applying a shorter period for remedying a 'constitutional tort' than for remedying the underlying state tort. . . ." The *Johnson* court held that to apply the special statute would be to "condone an unreasonable discrimination between the assertion of federally protected rights and rights under Virginia law," *id.* at 1317. The panel in the present case, however, does not suggest that the Pennsylvania six-month statute discriminates against federal rights. *See also Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977) (refusing to borrow a 30 day period).

The Supreme Court in *Tomanio* took occasion to reiterate its emphasis on "the importance of the policies underlying state statutes of limitations." *Id.* at 487. To gauge whether state limitations statutes are consistent with the policies underlying section 1983, *Tomanio* instructed the federal courts that "the state and federal policies which the respective legislatures sought to foster must be identified and compared." *Id.* at 487.

There is no indication that the opinion in the present case follows *Tomanio's* direction to give weight to the significant policies underlying the state statute of limitations. Moreover, despite its description of the general policies behind section 1983, the panel has not explained with any precision why the six-month period cannot be squared with those policies. Indeed, much of the same reasoning that the panel employs in rejecting the limitations period of section 5522(b)(1) could equally be applied to strike down any limitations period, for any such period arguably circumscribes the broad sweep of section 1983. The panel has made no attempt to demonstrate with specific reference to the facts of this case that six months was insufficient for the plaintiff to file a complaint. Instead, without citing any evidence or empirical data, it speaks of this period as being too limited for the "average plaintiff." Slip op. at 10.[2] The panel does not even rely on the special nature of employ-

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[2] It is worth noting that when Congress has prescribed periods for the filing of charges under civil rights statutes, it has sometimes chosen a limit of 180 days. *See* 42 U.S.C. §2000e-5(e) (§706(e) of Title VII of the Civil Rights Act of 1964, as amended); 42 U.S.C. §3610(b) (§810 of Title VIII of the Civil Rights Act of 1968). I recognize, of course, that it may require more time to prepare a complaint to be filed in federal district court than to bring a charge with the Equal Employment Opportunity Commission under 42 U.S.C. §2000e-5 or with the Secretary of Housing and

ment discrimination cases; it appears to indicate that six months is too short in *all* types of section 1983 actions. Thus the panel seemingly would make it impossible to borrow a six-month statute even in section 1983 actions that easily could be commenced within six months. I cannot see why, for example, a prisoner alleging that the warden improperly deprived him of some of his property could not be expected to file a complaint within six months. Yet a large proportion of section 1983 actions are brought by prisoners making allegations such as this.

In sum, I believe that this case warrants rehearing before the entire court because it appears that the panel, in disregard of *Tomanio,* neither considered the state policies involved nor identified with any specificity the federal policies, and also because I am concerned about the creation of a split among the circuits on this highly important issue.

Judges Hunter, Weis, and Garth join in this statement.

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Urban Development under 42 U.S.C. §3610. On the other hand, the federal rules permit liberal amendments of complaints brought in district court, and so a time limit on federal complaints may not be as burdensome as it seems.

In the present case the same facts that give rise to the plaintiff's section 1983 action also form the basis of her Title VII claim. The panel does not explain why Congress, although giving the plaintiff only six months to file her Title VII charge with the EEOC, could not have intended for the federal courts to borrow a six-month statutes of limitation to bar the plaintiff's section 1983 action.